IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 216 OF 1996

Motisingh Suratsing Rajput (Sonar)..... Appellant.

versus

The State of Maharashtra ..... Respondents.

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Mrs. V.V.Thorat for the appellant
Shri D.R. More APP for the State.

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CORAM ; V.G.PALSHIKAR &
R.C. CHAVAN, JJ.

DATED; 27TH JUNE, 2005

ORAL JUDGMENT (Per Palshikar, J.);

1. Being aggrieved by the judgment dated 29-2-1996 passed by the IIIrd Additional Sessions Judge, Kolhapur in Sessions Case No. 259 of 1992, the appellant has preferred this appeal on the ground mentioned in the memo of appeal as also canvassed before us.

2. With the assistance of the learned advocate appearing on behalf of the appellant and the learned APP, we have scrutinised the entire record, and re-appreciated the evidence both oral and documentary as is raised on the record before the Additional Sessions Judge.

3. The prosecution story stated briefly is that on 6th March 1992 at about 8.30 p.m. the accused Motisingh allegedly assaulted Mahadeo Thombare with gupti resulting in death of Mahadeo Thombare. A complaint to that effect was therefore lodged by his wife Rajashri against the accused. The accused was arrested on 7th March. Investigation was completed and the accused was prosecuted for committing an offence under section 302 of IPC. The prosecution examined 15 witnesses to prove its case and the learned trial Judge accepting the evidence of the prosecution as adequate convicted the accused as aforesaid. This appeal is directed against the order of conviction.

4. P.w.1 Rajashri is the complainant who heard about the assault from P.w.3 Sagar, who allegedly a witness of attack and is therefore an eye witness. P.w.2 Ajit Kole is the panch to the recovery and seizure of the clothes of the accused but he has been declared hostile. The inquest panchanama is proved by P.w.4 Dilip. P.w.5 Vaishali is the daughter of the accused who has declared hostile. P.w.6 Shakuntala is also declared hostile. It was the case of the prosecution that it is because of her relationship with the accused that the accused was enraged in attacking the deceased

Mahadeo for alleged interference with his affair with Shakuntala. However she has denied the affair. Her denial or acceptance is inconsequential in view of the fact that she has declared hostile. P.ws. 7, 8, 9, 10, 11, 12 and 13 are all declared hostile. P.w.14 is witness Suresh. P.w.15 is the investigating officer on whose evidence heavy reliance has been placed by the learned trial Judge for convicting the accused.

5. The learned counsel appearing on behalf of the accused submitted that the prosecution has completely failed to prove that the assault was committed by the accused and consequently the conviction is unsustainable in law. She very heavily relied on the deposition of P.w.14 Suresh Palekar, and contended that there is no eye witness to the incident and therefore the prosecution has failed to prove any nexus between the killing and the accused. She also stated on facts that 8 out of the 15 witnesses have turned hostile. P.w.3 Sagar on the basis of whose testimony P.w.1 has lodged the complaint, is not an eye witness, and consequently the conviction is illegal and therefore unsustainable. These contentions were refuted by the learned APP who pointed out that the evidence is adequate for the conviction since the eye witness account is not liable to be disbelieved. we have to

consider this rival contentions in the light of the evidence as reappreciated by us. It has to be kept in mind that 8 of the witnesses having turned hostile the very foundation of the prosecution case is shaken. The whole case rests on the testimony of P.w.3 Sagar. The prosecution has failed to prove recovery of the weapon. It has failed to prove that the clothes of the accused were blood stained and stains were that of the blood of victim. We will therefore analyse the evidence of P.w.3 Sagar who is the eye witness according to the prosecution.

6. He has deposed to that the incident took place four years prior to his deposition. He was returning around 8 to 8.30 p.m. to his home and he was walking down, when he saw the accused and the deceased walking together. It is the statement of this witness that the accused asked him to hold his cycle. He held it and started walking with them. They went to the house of the accused. Accused went into the house, came out with gupti and hit on the chest of the deceased. The witness therefore ran away. The witness is extensively cross examined. He has sought to improve his statement in cross examination by stating something which he has not deposed to in his examination in chief. He is emphatic on his statement that he saw the accused and

that he was holding the cycle of the accused. That cycle was in good condition. There is no reason why he should be asked to hold the cycle. In any event, the witness is emphatic about this aspect. He is also very emphatic about the assault. Thus, according to this witness, he was walking with the accused and the deceased and the accused and the deceased along with the witness went to the house of accused and accused went inside brought out gupti and stabbed the victim. The witness it is alleged, tried to pull back the accused but failed and the accused stabbed the victim through chest. In this case, the prosecution has not examined the doctor who conducted the post mortem. Probably because the document is accepted by the accused. All that is proved, in the circumstances, is that the death of the victim was homicidal. There is nothing on record to connect the stabbing, as alleged by the sole eye witness Sagar and medical evidence. Rest of the witnesses are hostile. The recovery is therefore not proved. The witness who recovered the gupti, according to police, is turned hostile. The panch who witnessed the recovery has turned hostile. There is therefore nothing on record to prove that there was factual recovery of gupti and that it was connected to the accused.

7. Apart from this, the evidence of P.w.14 is very material. One fails to understand as to why this witness was examined by the prosecution. He has deposed that he knows the accused and he has very categorically stated that on the date of the incident, the accused came to his shop and kept his cycle there. We will assume that there is some error in the mentioning of time but he emphatically states that the cycle was kept by accused in the shop and it was there for two days. If this testimony of this witness is accepted, it positively disproves the testimony of P.w.3 who claims to be an eye witness and who claims that he held the cycle of the accused and accompanied the accused and the deceased to the house of the accused. There is no reason why the witness P.w.3 should go with the accused and the deceased. There is no claim of acquaintance or ownership. Apart from that the claim of the witness P.w.3 Sagar, that he held the cycle and that he was with the accused and deceased is disputed by the evidence of P.w.14 who creates serious doubt about the testimony of P.w.3 Sagar. It shakes the very foundation of his claim to be the eye witness of the assault. If this evidence is ignored as it is liable to be ignored there is nothing on the basis of which the conviction can be sustained. It will be seen from the deposition of P.w.14 that the testimony of

P.w.3 Sagar cannot be accepted. If that is taken away, there is nothing on the basis of which the conviction can be sustained. In our opinion, the prosecution has therefore miserably failed to prove any involvement of the accused with the homicidal death of the victim, though homicidal death is established. In the absence of any evidence of such involvement, it is impossible to sustain the order of conviction.

8. In the result, the appeal succeeds and is allowed. The conviction and sentence recorded u/s. 302 IPC by the learned trial Judge is set aside. The accused is already on bail. His bail bonds are cancelled.

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